1. A compulsory contribution constituting a parafiscal charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it wholly offset the burden borne by those products, constitutes a charge having an effect equivalent to customs duties prohibited by Articles 9 and 12 of the Treaty. If those advantages only partly offset the burden borne by domestic products, the charge constitutes discriminatory internal taxation within the meaning of Article 95 of the Treaty, the collection of which is prohibited as regards the proportion used to offset the burden borne by the domestic products. The mere fact that the charge is levied on imported products without deduction of a domestic charge, similar in kind but regulated independently by national legislation which was imposed on the same products in the exporting Member State, does not render the charge incompatible with Article 95 of the Treaty.

2. The collection of a compulsory contribution constituting a parafiscal charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, may constitute State aid incompatible with the common market if the conditions for the application of Article 92 of the Treaty are met, that being a matter which the Commission alone is competent to determine in accordance with the procedure laid down for that purpose in Article 93 of the Treaty and subject to review by the Court.

REPORT FOR THE HEARING
in Case C-72/92 *

I — The disputed national legislation, the main proceedings and the questions referred to the Court

1. The German Law of 26 June 1969 (BGBl. I, p. 635), in the version published in the official notice of 8 November 1976 (BGBl. I, p. 3109), provides *inter alia* as follows:

'*Article 1 — Legal form*

A Fund to promote the marketing of German agricultural, forestry and food products (Sales Promotion Fund) shall be established as a body governed by public law with its registered office in Bonn.

* Language of the case: German.

Article 2 — Functions

(1) The Sales Promotion Fund shall promote, from a central point, the marketing and use of German agricultural, forestry and food products by opening up and developing domestic and foreign markets through the use of modern methods and techniques.

(2) In order to perform its functions, ... the Sales Promotion Fund shall employ a central organization which shall be responsible for promoting the marketing and use of German agricultural, forestry and food products and which may not engage in trading operations on its own account. ...

(3) In order to perform its functions in so far as they concern market reports, the Sales Promotion Fund shall employ a special central organization. The latter improve market transparency and act in the interests of all market participants.

(4) In order to perform its functions, the Sales Promotion Fund shall make resources available to the organizations mentioned in paragraphs 2 and 3. ...

Article 10 — Financing

(1) The Federal Government shall appropriate ... to the Sales Promotion Fund. ... Other revenue shall accrue to the Fund in the form of contributions in accordance with the following paragraphs.

(2) Contributions shall be levied on undertakings in the agricultural, forestry and food sector in accordance with paragraphs 3 to 8.

(3) The contribution shall amount:

...

9. for undertakings presenting for inspection the carcasses of animals slaughtered for commercial purposes,

...

to DM 1 per pig,

...'

2. Scharbatke GmbH operates a slaughterhouse and a wholesale meat business. Between May and August 1985 11 599 pigs were slaughtered in the company's plant and the carcasses presented for inspection. It appears from the order for reference that most of the pigs came from the Netherlands, where they had been subject to a national charge to finance measures to promote sales of Netherlands agricultural and food products, and that Scharbatke marketed the pork in Germany under the trade description 'Meat from Dutch sows'.

3. By notice of 24 October 1985 the German authorities demanded payment of a total of DM 11 867.80 from the company in question in accordance with Article 10(3)(9) of the German law cited above. Following the rejection of its objection, the company commenced proceedings for annulment of that demand for payment.

4. The Verwaltungsgericht (Administrative Court), Frankfurt am Main, before which the case came, expressed serious doubts as to whether the contributions are compatible with Community law.

5. The national court considers first that Articles 9 and 12 of the EEC Treaty may have been infringed. Citing the judgments of the Court in Case 94/74 *IGAV* v *ENCC* [1975] ECR 699 and in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987, it notes that the conditions set out therein are met in the present case, as the advantage financed by the contributions in question benefits only the domestic products. It observes that the Court has previously had occasion to consider the system established by the Sales Promotion Fund (hereinafter 'the Fund') in its judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595 and that it did not find any infringement of Community law to have occurred as far as charges having equivalent effect are concerned. The Verwaltungsgericht nevertheless discerns a degree of contradiction between this judgment and the two judgments cited above.

6. As regards the possible application of Article 95 of the EEC Treaty in this case, the Verwaltungsgericht refers to the principles set out in the judgment in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, noting that the applicant had already paid similar contributions in the Netherlands.

7. Finally, the national court believes that the levying of the contributions in question may be incompatible with Articles 92 and 93 of the Treaty regarding State aid and wonders whether it is authorized to take these provisions into consideration in reaching its decision. It refers in this regard to the case-law of the Court, and especially to the judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, in which the Court held that State aid may be incompatible with the common market because of the method of financing used, particularly if it has a protective effect which goes beyond aid properly so-called.

8. In view of these considerations, the Verwaltungsgericht Frankfurt am Main made an order on 11 December 1991 staying the proceedings and referring the following questions to the Court for a preliminary ruling:

'(1) Does a national charge levied on pork imported from another Member State and marketed under a trade description that alludes to the slaughtered animals' country of origin qualify as a "charge having equivalent effect" within the meaning of Articles 9 and 12 of the EEC Treaty if, although levied on domestic meat as well, the charge is assigned entirely to a fund whose sole statutory purpose is to promote the sale and use of products from the domestic agricultural, forestry and food industry?

(2) If not, does a charge as described in Question 1 qualify as "indirectly

[imposed] ... internal taxation ... in excess" within the meaning of the first paragraph of Article 95 of the EEC Treaty, or as "internal taxation of such a nature as to afford indirect protection to other products" under the second paragraph of Article 95 of the EEC Treaty if, prior to importation, the slaughtered animals were subject to a similar charge in their country of origin which was disregarded for the purpose of levying the charge in the country of importation?

(3) Is a national court authorized to determine whether the levying of a national charge as described in Question 1 is compatible with Community law under Article 92 of the EEC Treaty when the plaintiff shows conclusively in the national proceedings that he suffers discrimination owing to a national aid scheme inasmuch as he is obliged, by paying the charge, to contribute to financing the aid and yet, as an importer, does not belong to the class of persons entitled to receive it?

(4) If Question 3 is answered in the affirmative, does the financing of the fund described in Question 1 above from charges levied on pork from other Member States represent an indirectly protectionist arrangement, comparable in its operation to a protectionist aid scheme for the purposes of Article 92 of the EEC Treaty? Is such an arrangement incompatible with the common market under Article 92? Is such an arrangement therefore prohibited under Article 92 in the same way as a comparable protectionist aid scheme?'

9. The order for reference was received at the Court Registry on 9 March 1992.

II — Written procedure

10. In accordance with to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 22 May 1992 by Scharbatke GmbH, the plaintiff in the main proceedings, represented by L. Liebenau, Rechtsanwalt, on 12 June 1992 by the German Government, represented by Ernst Röder, acting as Agent, and on 10 June 1992 by the Commission of the European Communities, represented by R. Wainwright, Legal Adviser, and by A. Bardenhewer, of its Legal Service, acting as Agents.

11. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

III — Written observations submitted to the Court

Observations of the plaintiff in the main proceedings

12. *Scharbatke GmbH* maintains that the levying of contributions on animals imported into the Federal Republic of Germany from other Member States of the Community is contrary to Articles 9 and 12 of the Treaty, given that the charge on similar domestic products is offset by the measures taken by the Fund. In the plaintiff's view, the promotional activities of the Fund in practice wholly or partly cancel out

the charge borne by German firms subject to the contribution. Such a system of dues only has the appearance of a system of internal taxation and can therefore be described as a charge having an equivalent effect by reason of its protectionist nature.

13. The close connection required by the case-law of the Court between the levying of a fiscal contribution and the advantage granted only to domestic products through the use of the resources stemming from that contribution is, in the plaintiff's opinion, established in the case before the Court. The purpose of the Fund is to induce the consumer to opt for German products, at the expense of foreign products. The Fund's advertising in favour of German products cannot, according to the plaintiff, have a favourable effect on sales of similar imported products.

14. The plaintiff in the main proceedings considers, contrary to the opinion of the national court, that the *Steinike und Weinlig* judgment (cited above) does not conflict with the *IGAV* and *Cucchi* judgments (cited above). In the *Steinike und Weinlig* judgment the Court clearly attached importance to the equal treatment of products in the levying of taxation and to the absence of any difference in the indirect treatment of imported products in relation to domestic products, a difference which could, for example, be caused by measures for the centralized marketing of the latter products.

15. If the Court holds that the contributions in question cannot be considered as a charge having equivalent effect, the plaintiff in the main proceedings maintains that it is in any case necessary to consider them incompatible with Article 95 of the Treaty. It refers in this regard to the *Schul* judgment, cited above, and argues that the German authorities could not demand a contribution at the full rate but only a contribution reduced by the amount of the contribution already paid in the Netherlands.

16. If the Court replies in the affirmative to the third question and allows the national court to determine whether the contributions in question are compatible with Article 92 of the Treaty, the plaintiff in the main proceedings maintains that, in accordance with the conclusions reached in the judgment in Case 47/69, cited above, aid may perfectly well be contrary to Article 92 of the Treaty on account of the method by which it is financed.

17. In that regard, the plaintiff argues that in the present case the amount of the Fund's aid in favour of domestic products automatically rises in proportion to the increase in the revenue from the contributions, and more especially that from the contributions levied on imported products. Consequently the method of financing the Fund's activities has a protective effect which goes beyond aid properly so-called. Contributions to the Fund are therefore contrary to Article 92 of the Treaty inasmuch as they are levied on imports from other Member States.

Observations of the German Government

18. The defendant in the main proceedings observes, with regard to the *first question*,

that the essential distinction between a charge having equivalent effect and internal taxation within the meaning of Article 95 of the Treaty is that the former is levied exclusively on imported goods whereas the latter is levied on both imported and domestic goods. In its view, the disputed contributions form part of a general system of internal taxation. Imported products are not taxed by virtue of their importation but because they have been imported at a certain stage of processing at which they are liable for the charges in the same way as domestic products. Hence, these contributions do not, according to the German Government, constitute charges having equivalent effect.

19. However, in accordance with the case-law of the Court, it is necessary to take account also of the use to which the revenue from the contributions in question is put (Joined Cases C-78 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* v *Receveur Principal des Douanes de La Pallice Port* [1992] ECR I-1847). The German Government states in this regard that the disputed contributions also benefit producers whose animals have been imported into Germany. It maintains that the Fund's advertising is directed exclusively at the final consumer. Hence, advertising for butchery products is not based on the origin of the animals or on the composition of the processed products. The German legislation on the Fund cannot be interpreted, in the context of marketing promotion, as meaning that products from the treatment or processing of animals of foreign origin should be excluded from advertising. On the contrary, all butchery products without distinction benefit from advertising without consideration of their origin since only treatment and processing take place in Germany. According to the defendant in the main proceedings, the increase in demand for products manufactured by the meat industry, which is the Fund's objective, favours demand for unprocessed products from both foreign and domestic sources equally.

20. In the light of the case-law of the Court, the German Government therefore suggests that the first question should be answered in the negative.

21. The German Government proposes that the *second question* should also be answered in the negative, on the grounds that the disputed contribution applies to domestic and imported products at the first stage of processing without any difference on the basis of origin either in the rates of contribution, or in the basis of the charge or in the method of collection.

22. In view of the case-law of the Court, whereby under Article 95 of the Treaty it is necessary to take account of the use to which the revenue from the taxation under consideration is put, the German Government again maintains that the sales promotion measures financed by the Fund benefit both domestic and foreign unprocessed products provided they are treated or processed in Germany. Foreign products that are not treated or processed in that country are not subject to the taxation at issue.

23. The German Government also maintains that the conclusions drawn from the *Schul* judgment, cited above, cannot be applied to the present case, since in the *Schul* case imports had, but the corresponding domestic products had not, been taxed, whereas in the present case the disputed contribution paid

by the applicant is calculated according to the same criteria as that payable by a German national liable to pay the charge.

24. As regards the *third question*, the German Government states that, as the Court has consistently held, it is for the Commission to examine the compatibility of a national aid measure with Article 92 of the Treaty in accordance with the procedure laid down for that purpose in Article 93 of the Treaty, and subject to review by the Court (*Steinike und Weinlig*, cited above, Case C-354/90 *FNCE* [1991] ECR I-5505 and *Compagnie Commerciale de l'Ouest*, cited above).

25. In the opinion of the German Government, there is no reason to depart from this case-law, particularly as the Council has still not adopted the implementing regulations for which Article 94 of the Treaty provides. The Law on the Fund was notified to the Commission in accordance with Article 93(3) of the Treaty and the Commission has not requested that the system for which it provided be amended. According to the German Government, the national court is therefore not competent to determine whether this system is compatible with Article 92 of the Treaty.

26. With regard to the *fourth question*, and notwithstanding the fact that a reply is not necessary in view of the negative answer given to the third question, the German Government argues that the methods of financing State aid are to be examined only in the light of Article 95 of the Treaty and not in accordance with Article 92 thereof.

27. In the view of the German Government, an infringement of Article 92 of the Treaty may result from the use of the revenue from a domestic contribution and not merely from the method of levying it. A discriminatory domestic contribution cannot of itself constitute grounds for considering the use of the revenue therefrom as aid prohibited by Article 92 of the Treaty. The same would apply if the opposite were true; fiscal discrimination cannot be justified by the fact that the discriminatory contribution serves to finance aid authorized in accordance with Article 92.

28. According to the German Government, it is therefore the use to which the revenue from an internal contribution is put that is decisive in determining whether the contribution is a prohibited State aid. It maintains that that conclusion is supported by the following consideration: if the illegality of the method of financing could lead to the State aid being illegal, that aid should in principle be repaid by the recipients. However, it cannot be held that an infringement of Community law from the point of view of financing can affect relations between the Member State concerned and the recipients of the aid in question.

29. The German Government also states that, at the time of the judgment in Case 47/69, cited above, the prevailing view was that the purpose of Article 95 of the Treaty was not to verify the use to which revenue from an internal contribution was put. On the contrary, such a contribution was held to be compatible with Article 95 when it applied to domestic and imported products alike. The case-law of the Court has developed since then inasmuch as, for the purposes of Article 95, account is also taken of

the use to which the revenue from internal taxation is put (Case 73/79 *Commission* v *Italy* [1980] ECR 1533, the so-called 'Sovraprezzo' case). It would thus be contrary to the article in question if the revenue from an internal contribution levied on domestic and imported products benefited only or primarily domestic products.

30. In the view of the German Government, the consequence of this development in the case-law is that a contribution which constitutes a parafiscal charge levied on domestic and imported products alike and the revenue from which is not used in a manner which discriminates against products from other Member States cannot be considered to be incompatible with Article 92 of the Treaty solely by reason of its financing, but only if the use of the revenue therefrom benefits mainly domestic products. In its view, those considerations are consistent with the fact that the Commission alone is competent to determine the compatibility of aid within the meaning of Article 92 of the Treaty, whereas the national court is entitled to establish whether an internal contribution complies with Article 95. It is therefore contradictory to deduce from the illegality of the method of financing, on which the national court can rule, that an aid over which it has no control is illegal.

31. The German Government concludes by observing that the facts of Case 47/69 differ greatly from those of the present case; the former case concerned aid which mainly benefited only domestic producers, in contrast to the position in the present case.

Observations of the Commission

32. The *Commission* observes first of all that, in order to perform its functions, the Fund calls on the services of the 'Zentrale Marketing—Gesellschaft der deutschen Agrarwirtschaft' (Central Marketing Company of the German Agricultural Sector), an organization which engages in collective publicity using modern techniques and methods, that is to say it organizes trade fairs, carries out market surveys, and so on.

33. With regard to the *first question*, the Commission notes that the disputed contribution levied when the animals are slaughtered is a charge having an effect equivalent to a tax applied without distinction to imported and domestic products, levied by the State and used for a specific purpose. In the present case, the contribution serves solely to promote the marketing of German products. For the purposes of the answer to this question, the Commission considers that it is necessary to distinguish between a charge having equivalent effect within the meaning of Articles 9 and 12 of the Treaty and an internal charge within the meaning of Article 95 of the Treaty, since a charge cannot belong to both of those categories simultaneously (*Cucchi*, mentioned above).

34. The Commission points out that, according to the case-law of the Court, a contribution levied specifically on imported products but not on similar domestic products constitutes a charge having equivalent effect and that financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to

be considered as charges having equivalent effect. Even pecuniary charges intended to finance the activities of an agency governed by public law can constitute charges having equivalent effect (Case 77/72 *Capolongo* v *Maya* [1973] ECR 611 and in *Cucchi*, cited above).

35. The Commission also notes that, according to the case-law of the Court, in order for an internal contribution to qualify as a 'charge having equivalent effect' the intended purpose of the revenue from that contribution must also be taken into account. Hence internal taxation levied on both imported and domestic products of a similar kind may constitute a charge having equivalent effect if it was intended exclusively to support activities which specifically benefit taxed domestic products.

36. The Commission observes that, after a degree of contradiction which it discerns in the previous case-law of the Court on the question whether, in order for internal taxation to qualify as a 'charge having equivalent effect', the burden borne by domestic products must be compensated in full or in part (*Steinike und Weinlig*, *Capolongo*, *IGAV*, *Cucchi* and *Sovraprezzo*, cited above), the case-law of the Court was stabilized and crystallized by the *Compagnie Commerciale de l'Ouest* judgment, cited above. Accordingly, in the Commission's view, internal taxation constitutes a charge having equivalent effect to customs duties prohibited by Articles 9 and 12 of the Treaty only if it is levied without distinction on domestic and imported products, is used to benefit only domestic products and is compensated in full as far as domestic products are concerned.

37. According to that case-law, it is for the national court to establish whether the advantage financed by the disputed contribution serves exclusively to promote the marketing and use of domestic products and whether it wholly offsets the burden imposed on those products. The question whether pigs from the Netherlands, marketed in Germany with a label indicating their country of origin, benefited from the Fund's promotional measures is also for the national court to decide.

38. Finally, the Commission observes that, according to the case-law of the Court, if the conditions described above are met, the fact that the charge in question is levied only at the time of slaughter, that is to say after the animals have crossed the border, does not preclude the application of Articles 9 and 12 of the Treaty.

39. With regard to the *second question*, the Commission observes that, again according to the case-law of the Court cited above, when an internal charge is applied without distinction according to the same criteria to domestic and imported products and the burden borne by the domestic products is offset in part by the use of the revenue from that charge, the charge in question constitutes internal taxation within the meaning of Article 95 of the Treaty which is prohibited in so far as it is discriminatory, that is to say in so far as it falls more heavily on imported products. Hence, in the present case, if the contribution levied on domestic products is partly offset by national promotion measures, such compensation is discriminatory by comparison with the amount levied on imported products.

40. The size of this discriminatory amount has to be established by the national court and the burden of proof rests with the national authorities. If, however, the precise extent to which there is discrimination against imported products cannot be established, the Commission considers that the charge should be removed altogether, as the only way of preventing direct or indirect discrimination. In the Commission's view, that is apparent from the case-law of the Court (Case 21/79 *Commission* v *Italy* [1980] ECR 1) and from the letter and spirit of Article 95 of the Treaty.

41. The Commission also maintains that the principles set out in the *Schul* judgment, cited above, cannot be applied to the taxation which is the subject of the present dispute. In the case of value added tax, there is a common system for which there exists a uniform basis of assessment in all the Member States and which can therefore be fully assessed on the basis of Article 95 of the Treaty. The present case, by contrast, relates to two different charges which by reason of fiscal autonomy are levied in different ways and the amount of which is not precisely known. The compatibility of each charge with Article 95 of the Treaty should therefore be examined separately and on the basis of the relevant national provisions. Consequently, in the view of the Commission, the German contribution is not in itself discriminatory by virtue of the fact that in the country of origin the imported product was already subject to another charge on domestic slaughtering which was not repaid at the time of exportation.

42. The Commission points out, with regard to the *third and fourth questions*, that Article 92 of the Treaty differs from Article 95 in that it does not have a direct effect. In accordance with the case-law of the Court, the prohibition contained in the first paragraph of the article in question is neither absolute nor unconditional. The Commission has responsibility for examining the compatibility of aid with the common market, in accordance with the procedure laid down for this purpose in Article 93 of the Treaty. In the Commission's view, individuals are therefore not permitted to rely on Article 92 of the Treaty in proceedings before a national court in claiming that aid is incompatible with Community law (*Compagnie Commerciale de l'Ouest*, cited above).

43. The Commission nevertheless points out that, again in accordance with the case-law of the Court, the following derogations from that principle apply: the national court may verify whether aid is compatible with Article 92 of the Treaty when the Commission has taken a decision under Article 93(2) thereof and may also verify compliance with Article 93(3). For example, an individual may claim that a national aid has not been notified to the Commission. In the present case, the disputed contribution was notified in accordance with Article 93(3).

44. The Commission concludes that even if it cannot be ruled out that in the present case the disputed contribution is incompatible with Article 92 of the Treaty on account of the method by which it is financed, no purpose would be served in answering the fourth question, as the national court is not qualified to apply Article 92 of the Treaty as to the substance.

C. N. Kakouris
Judge-Rapporteur